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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/784,498	02/23/2004	Dmitry Grebenev	063170.6658	2208
5073	7590	09/17/2009		
BAKER BOTTS L.L.P. 2001 ROSS AVENUE SUITE 600 DALLAS, TX 75201-2980			EXAMINER MEHRMANESH, ELMIRA	
			ART UNIT	PAPER NUMBER
			2113	
			NOTIFICATION DATE	DELIVERY MODE
			09/17/2009	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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BAKER BOTTS L.L.P.  
2001 ROSS AVENUE  
SUITE 600  
DALLAS, TX 75201-2980

In re Application of: Dmitry GREBENEV	)	
Application No. 10/784,498	)	DECISION ON PETITION FOR
Attorney Docket No. 063170.6658	)	SUPERVISORY REVIEW
Filed: 02/23/2004	)	UNDER 37 CFR §1.181
For: KERNEL-LEVEL METHOD OF	)	
FLAGGING PROBLEMS IN	)	
APPLICATIONS	)	

This is a decision on the petition under 37 CFR § 1.181, filed August 10, 2009, requesting the Commissioner to invoke his supervisory authority to withdraw the final Office action dated May 13, 2009.

The petition is **DISMISSED**.

**RECENT PROSECUTION HISTORY**

- (1) On November 04, 2008, a non-final Office action, rejecting all pending claims, was mailed.
- (2) On February 04, 2009, a response to the non-final Office action including remarks was filed (all pending independent claims were amended).
- (3) On May 13, 2009, a final Office action, rejecting all pending claims, was mailed.
- (4) On June 26, 2009, after final arguments along with a request for reconsideration was filed.
- (5) On July 14, 2009, an advisory action was mailed.
- (6) On August 10, 2009, a telephone interview between SPE Robert Beausoleil and Applicant Ryan Loveless took place; a summary of the conversation appears in the record.
- (7) On August 10, 2009, the instant petition was filed.
- (8) On August 11, 2009, a notice of appeal and pre-appeal brief req. for review were filed.

## RELIEF REQUESTED

The instant petition filed under 37 CFR 1.181 requests withdrawal of the final Office action of May 13, 2009.

## ANALYSIS

The relevant sections of the M.P.E.P. are set forth below:

MPEP § 706.07(a) states in part that:

*Under present practice, second or any subsequent action on the merits shall be made final*, except where the examiner introduces a new ground of rejection not necessitated by amendment of the application by the applicant, whether or not the prior art is already of record. Furthermore, a second or any subsequent action on the merits in any application or patent undergoing reexamination proceedings will not be made final if it includes a rejection, on newly cited art ... of any claim not amended by applicant or patent owner in spite of the fact that other claims may have been amended to require newly cited art.

§ 706.07(c) Final Rejection, Premature

Any question as to *prematureness of a final rejection* should be raised, if at all, while the application is still pending before the primary examiner. This *is purely a question of practice, wholly distinct from the tenability of the rejection*. It may therefore not be advanced as a ground for appeal, or made the basis of complaint before the Board of Patent Appeals and Interferences. It is reviewable by petition under 37 CFR 1.181.

706.07(e) [R-6] Withdrawal of Final Rejection, General

Once a final rejection that is not premature has been entered in an application/reexamination proceeding, it should not be withdrawn at the applicant's or patent owner's request except on a showing under 37 CFR 1.116(b). Further amendment or argument will be considered in certain instances. An amendment that will place the application either in condition for allowance or in better form for appeal may be admitted. Also, amendments complying with objections or requirements as to form are to be permitted after final action in accordance with 37 CFR 1.116(a). The examiner may withdraw the rejection of finally rejected claims.

714.13 [R-5] *Amendments and Other Replies After Final Rejection* or Action, Procedure Followed

### II. ENTRY NOT A MATTER OF RIGHT

It should be kept in mind that applicant cannot, as a matter of right, amend any finally rejected claims, add new claims after a final rejection (see 37 CFR 1.116) or reinstate previously canceled claims.

MPEP 1201, which sets forth:

The United States Patent and Trademark Office (Office) in administering the Patent Laws makes many decisions of a *\*>substantive<* nature which the applicant may feel deny him or her the patent protection to which he or she is entitled. The differences of opinion on such matters can be justly resolved only by prescribing and following judicial procedures. *Where the differences of opinion concern the denial of patent claims because of prior art or *\*\*>other patentability issues<*, the questions thereby raised are said to relate to the merits, and appeal procedure within the Office and to the courts has long been provided by statute >(35 U.S.C. 134)<*

*The line of demarcation between appealable matters for the Board of Patent Appeals and Interferences (Board) and petitionable matters for the *\*\*>Director of the U.S. Patent and Trademark Office (Director)<* should be carefully observed. The Board will not ordinarily hear a question *\*\*>that<* should be decided by the *\*>Director on petition<*, and the *\*>Director<* will not ordinarily entertain a petition where the question presented is *\*\*>a matter appealable to the Board<**

A review of the file record indicates that the final Office action mailed May 13, 2009 does not present a new ground(s) of rejection by the Examiner. Rather, the final Office action repeats all of the rejections set forth in the non-final Office action mailed November 04, 2008. As clearly set forth in MPEP § 706.07(a) above, a second or subsequent Office action can be made final wherein the Examiner repeats the grounds of rejection from the previous Office action. Accordingly, the finality of the May 13, 2009 Office action is deemed to be procedurally correct and consistent with current Office practice.

In the instant petition on pages 2-8 thereof under "Statement of Facts", Petitioner presents one main point for review. Applicant states in the instant petition that the Office actions presented by the Examiner, in particular the final Office action and advisory action, fail to advance the prosecution of the present application, since the Office actions *do not properly take note of Applicant's arguments or answer the substance of those traversal positions* in compliance with M.P.E.P. § 707.07(f) and § 706.07. The Examiner's position, as set forth in the final Office action, is that Applicant's arguments filed February 04, 2009 "have been fully considered but they are not persuasive" (see final Office action, pages 15-16 thereof).

A thorough comparison of the November 4, 2008 non-final Office action to the final Office action of May 13, 2009 reveals expanded arguments in the final action proffered by the Examiner at pages 3, 9-11 & 13-14 thereof. Note in particular pages 15-16 for extensive new arguments with respect to claim 9 and the reference to Chen, as set forth by the Examiner. Thus it appears that the Examiner has attempted to rebut arguments raised by Applicant. This is highlighted by the substance of the interview held on August 4, 2009 (see Examiner interview summary mailed on August 10, 2009). Finally, with respect to Applicant's remarks throughout the instant petition concerning arguments presented in the (after final rejection) reply submitted on June 26, 2009, Applicant is reminded, in accordance with MPEP 714.13(II), that amendments and other replies filed after final rejection are not entered as a matter of right.

As set forth in MPEP 1201 above, where the differences of opinion concern the denial of patent claims because of prior art or other patentability issues, the questions thereby raised are said to relate to the merits, and appeal procedure within the Office and to the courts has long been provided by statute (35 U.S.C. 134). Such issues regarding differences of opinion are thus appealable, rather than petitionable. The proper venue to resolve such differences is at the Board of Appeals.

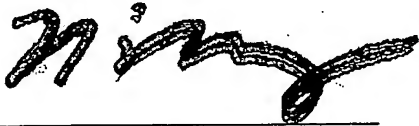
Note, for informational purposes, Applicant and Examiner should be made aware, as set forth in MPEP § 707.07(f):

The importance of answering applicant's arguments is illustrated by *In re Herrmann*, 261 F.2d 598, 120 USPQ 182 (CCPA 1958) where the applicant urged that the subject matter claimed produced new and useful results. The court noted that since applicant's statement of advantages was not questioned by the examiner or the Board of Appeals, it was constrained to accept the statement at face value and therefore found certain claims to be allowable. See also *In re Soni*, 54 F.3d 746, 751, 34 USPQ2d 1684, 1688 (Fed. Cir. 1995) (Office failed to rebut applicant's argument).

## CONCLUSION

Accordingly, for the above stated reasons, the petition and request to withdraw the final Office action of May 13, 2009 is **DISMISSED**. The application is being forwarded to the Examiner for consideration and processing of the pre-appeal brief request for review filed on August 11, 2009.

Any inquiries related to this decision may be directed to Quality Assurance Specialist Brian Johnson at (571) 272-3595.

A handwritten signature in black ink, appearing to read 'N Ramirez', with a horizontal line underneath.

Nestor Ramirez, Group Director  
Technology Center 2100  
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NR:blj